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No. (1)

Supreme Court, U.S.
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In The Supreme Court of the United States

GERMAR SCHEERER, A/K/A GERMAR RUDOLF,

Petitioner,

v.

MICHAEL B. MUKASEY, U.S. ATTORNEY GENERAL; MICHAEL CHERTOFF, SECRETARY OF THE DEPARTMENT OF HOMELAND SECURITY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTION PRESENTED

Whether the Board of Immigration Appeals, within the Executive Office for Immigration Review of the U.S. Department of Justice, abuses its discretion as a matter of law in denying a motion to reopen and continuance to allow for an arriving alien in removal proceedings to obtain a determination of her adjustment of status application by the Department of Homeland Security's United States Citizenship and Immigration Services?

PARTIES TO PROCEEDING

The Petitioner is Germar Scheerer a.k.a. Germar Rudolf. The Respondents are Michael Mukasey, the Attorney General of the United States and Michael Chertoff, the Secretary of the Department of Homeland Security of the United States.

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PETITION FOR WRIT OF CERTIORARI

Germar Scheerer a.k.a. Germar Rudolf respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Eleventh Circuit is reported at 513 F.3d 1244 (11th Cir. 2008). The opinion of the Board of Immigration Appeals denying Petitioner's motion to reopen is unreported. The opinion of the Immigration Judge ordering the Petitioner removed from the United States is unreported.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Eleventh Circuit was entered on January 15, 2008. Petitioner did not petition the Court of Appeals for rehearing or rehearing *en banc*. On March 21, 2008, Petitioner filed an application to extend time to file a Petition for writ of certiorari, which this Honorable Court granted on March 26, 2008, extending the deadline to June 13, 2008.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

REGULATORY PROVISIONS INVOLVED

8 C.F.R. § 1245(a)(1) provides that an immigration judge (IJ) has exclusive jurisdiction to adjudicate any application for adjustment of status that an alien who has been placed in deportation or

removal proceedings may file. It further permits arriving aliens in removal proceedings to apply for adjustment of status, but deprives the IJ of jurisdiction to adjudicate such applications, instead conferring jurisdictions solely upon USCIS.

STATEMENT

This case involves the issue of whether the BIA abuses its discretion as a matter of law in denying a motion to reopen and continuance so that an arriving alien in removal proceedings may obtain a determination of her adjustment of status application before USCIS. The Eleventh Circuit Court of Appeals held that the BIA's refusal to reopen and continue is not an abuse of discretion. However, both the Second and Ninth Circuit Courts of Appeals have held to the contrary. To resolve this split in the circuits, this Honorable Court should grant writ of *certiorari* in this case.

Petitioner, a native and citizen of Germany, is married to a U.S. citizen and is the father of a U.S. citizen child. Petitioner fled his homeland in 1995 to escape a prison sentence and further prosecution for allegedly inciting racial hatred in violation of German Penal Code, Strafgesetzbuch ar. 130, §§ 305 (F.R.G.) (Section 130). Petitioner entered the U.S. on August 9, 2000 as a conditional parolee and subsequently filed an application for asylum and withholding of removal. On April 22, 2001, legacy Immigration and Naturalization Service ("INS") issued Petitioner a Notice to Appear ("NTA"), finding him removable for failure to possess a valid entry document. An IJ ultimately found Petitioner removable as charged in the NTA. Petitioner appealed the order and the BIA affirmed without opinion on November 8, 2004.

While his petition before the BIA was pending, Petitioner filed a motion with the BIA to reopen removal proceedings so that he could adjust

his status to that of a lawful permanent resident based on his marriage to a U.S. citizen. The BIA denied this motion, finding that, as an arriving alien in removal proceedings, Petitioner was ineligible under former 8 C.F.R. § 1245.1(c)(8). Petitioner filed a motion for reconsideration with the BIA which the BIA also denied.

Petitioner then filed two timely petitions for review with the Eleventh Circuit of the BIA decisions denying Petitioner's motion to reopen his removal proceedings and further motion for reconsideration, and these appeals were consolidated. In November, 2005, while this consolidated appeal was pending, both the Eleventh Circuit and this Honorable Court denied Petitioner's emergency motions to stay removal pending appeal, and Petitioner was removed from the U.S. to Germany.

On April 13, 2006, in *Scheerer v. Attorney General*, 445 F.3d 1311 (11th Cir. 2006) ("*Scheerer I*"), the Eleventh Circuit held that 8 C.F.R. § 1245.1(c)(8),[1] which banned arriving aliens from adjusting their status in the U.S., as applied to all aliens who were granted parolee status, was an impermissible construction of the governing statute

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[1] 8 C.F.R. § 1245.1(c)(8) provided that:

> The following categories of aliens are ineligible to apply for adjustment of status to that of a lawful permanent resident alien under [8 U.S.C. § 1255]
>
> ....
>
> Any arriving alien who is in removal proceedings pursuant to [8 U.S.C. §§ 1225(b)(1) or 1229a].

(8 U.S.C. § 1255). *See id.* at 1321. The Eleventh Circuit then remanded Petitioner's case to the BIA for further proceedings.

Following the Eleventh Circuit's remand order, immigration authorities agreed to transport Petitioner back to the U.S. for the remand proceedings. However, Petitioner was never transported back to the U.S. and never had the opportunity to have his adjustment of status application reviewed because, following the Eleventh Circuit's decision, the Attorney General promulgated a new interim regulation, repealing 8 C.F.R. § 1245.1(c)(8) and replacing it with an amended 8 C.F.R. § 1245.2(a)(1) [hereinafter "Interim Regulation"].[2] The amended regulation permits arriving aliens in removal proceedings to apply for

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[2] 8 C.F.R. § 1245.2(a)(1) was amended to provide as follows: (i) *In General.* In the case of any alien who has been placed in deportation proceedings or in removal proceedings (other than as an arriving alien), the immigration judge hearing the proceeding has exclusive jurisdiction to adjudicate any application for adjustment of status the alien may file. (ii) *Arriving Aliens.* In the case of an arriving alien who is placed in removal proceedings, the immigration judge does not have jurisdiction to adjudicate any application for adjustment of status filed by the arriving alien unless: (A) The alien properly filed the application for adjustment of status with USCIS while the arriving alien was in the United States; (B) The alien departed from and returned to the United States pursuant to the terms of a grant of advance parole to pursue the previously filed application for adjustment of status; (C) The application for adjustment of status was denied by USCIS; and (D) DHS placed the arriving alien in removal proceedings either upon the arriving alien's return to the United States pursuant to the grant of advance parole or after USCIS denied the application. 71 Fed. Reg. 27,591-592 (May 12, 2006).

adjustment of status, but deprives the IJ of jurisdiction to adjudicate such applications and instead confers jurisdiction solely upon USCIS.

In light of this new Interim Regulation, the BIA once again denied Petitioner's motion to reopen, holding that the IJ lacked jurisdiction. Petitioner filed a motion for reconsideration which the BIA also denied.

Petitioner then appealed again to the Eleventh Circuit[3] contending that the BIA abused its discretion by denying Petitioner's motion to reopen and to compel the IJ to continue removal proceedings so that his adjustment of status application could be decided by USCIS.[4]

In *Scheerer v. U.S. Atty. Gen.*, 513 F.3d 1244 (11th Cir. 2008) ("*Scheerer II*"), the Eleventh Circuit held that, since the IJ would never have authority to adjudicate Petitioner's adjustment of status application, the BIA did not abuse it discretion in denying his motion to reopen proceedings before the

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[3] The basis of the Eleventh Circuit's jurisdiction over Petitioner's appeal was 8 U.S.C. § 3.1(a)(7), an appeal from a final agency determination; § 242(a)(1) of the Immigration and Nationality Act ("INA"), codified at 8 U.S.C. § 1252(a)(1), providing that judicial review of a final order of removal is governed by chapter 158 of title 28 of the U.S. Code, which in turn, confers jurisdiction to the federal courts of appeals over certain agency decisions; and the Administrative Procedure Act ("APA"), 5 U.S.C. § 702, which confers jurisdiction to the federal courts of appeals to review DOJ regulations.

[4] Petitioner also challenged the validity of the new interim regulation, an argument which the Eleventh Circuit rejected. Petitioner is not petitioning for *certiorari* review of this issue.

IJ. *See id.* at 1254. As a result of this holding, Petitioner is effectively precluded from exercising his right under the Interim Regulation to apply for adjustment of status with USCIS.[5]

It is this holding for which Petitioner seeks *certiorari* review.

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[5] Adjustment of status is only available to those present within the U.S. A noncitizen "adjusts status" by applying for lawful permanent residence while in the U.S. 8 U.S.C. § 1255(a) allows a noncitizen to apply for adjustment of status to that of a lawful permanent resident if she: (1) has been inspected and either admitted or paroled into the U.S.; (2) is the beneficiary of an approved petition that makes an immigrant visa immediately available to her; and (3) is otherwise eligible for permanent residence. There are no limits in the statute to the adjustment eligibility of a parolee in removal proceedings. *See Scheerer I*, 445 F.3d at 1322.

REASONS FOR GRANTING THE PETITION

The Eleventh Circuit's holding in *Scheerer II* pits the Court in direct opposition to the Ninth and Second Courts of Appeals, contravenes BIA precedent and regulatory intent, and creates a deepening circuit split in three of the most immigrant-heavy circuits in the country.

A. This Court should grant *certiorari* because the Eleventh Circuit's erroneous decision upholding the BIA's denial of Petitioner's motion to reopen on purely jurisdictional grounds negates the purpose and intent of the Interim Regulation and precludes otherwise eligible arriving aliens in removal proceedings from applying for adjustment of status.

BIA precedent dictates the process for review of a motion to reopen removal proceedings to allow a noncitizen to apply for adjustment of status. The BIA has long held that a motion to reopen is proper when a noncitizen becomes eligible for relief from removal, in the form of adjustment of status, subsequent to an order of removal. *See Matter of Garcia*, 16 I&N Dec. 653 (BIA 1978). Where the adjustment eligibility is based upon a marriage entered into prior to the initiation of removal proceedings, the movant need only submit a *prima facie*-approvable visa petition and adjustment application to secure a reopening. *See id.*

The BIA has also established a clear standard for determining when to grant a motion to reopen so that the noncitizen – such as Petitioner – who marries while in proceedings can have the opportunity to apply for adjustment of status based upon that marriage. In *Matter of Velarde*, 23 I&N Dec. 253 (BIA 2002), the BIA held that a motion to reopen to allow the noncitizen to apply for adjustment of status based on a marriage entered into while in proceedings should be granted when the following factors are satisfied:

> (1) the motion is timely filed; (2) the motion is not numerically barred by the regulations; (3) the motion is not barred by *Matter of Shaar*, 21 I&N Dec. 541 (BIA 1996), or on any other procedural grounds; (4) the motion presents clear and convincing evidence indicating a strong likelihood that the respondent's marriage is bona fide; and (5) the [legacy INS] does not oppose the motion or bases its opposition solely on *Matter of Shaar*.

23 I&N Dec. at 256.

In *Velarde*, the BIA modified its earlier precedent that disallowed a motion to reopen proceedings for adjustment in any case in which the marriage giving rise to eligibility for adjustment was entered into after removal proceedings commenced. *See id.* at 254-55. The BIA, in *Velarde*, revised its prior precedent in order to "afford respondents who present sufficient evidence a single opportunity to have their adjustment applications adjudicated." *Id.*

at 257. Moreover, the BIA recognized that such an opportunity was "consistent with Congress' legislative intent in amending the marriage fraud provisions: that aliens who marry after proceedings have been initiated, and who seek adjustment of status, should be afforded one opportunity to present clear and convincing evidence that their marriage is bona fide." *Id.* (citing legislative history of marriage fraud documents).

Under this precedent, the BIA was obligated to review the *Velarde* criteria when it considered Petitioner's case upon remand from the Eleventh Circuit. As the BIA has explained: "[e]very application necessarily requires examination of the relevant factors and a determination of the weight such factors should be accorded in the exercise of discretion." *Velarde*, 23 I&N Dec. at 256. In Petitioner's case, however, the BIA never considered any of the *Velarde* factors. Instead, the BIA failed altogether to exercise any discretion when it denied Petitioner's motions on the grounds that USCIS, rather than the IJ, would have jurisdiction over the adjustment application. This failure of the BIA to follow its own precedent is an abuse of discretion. *See, e.g.*, *Osei v. INS*, 305 F.3d 1205, 1210 (10th Cir. 2002) (holding that an agency cannot reverse course from prior precedent without explanation). Further, the BIA's denial of Petitioner's motions without an exercise of any discretion whatsoever is an abuse of discretion. *See, e.g.*, *Accardi v. Shaughnessy*, 347 U.S. 260 (1954).

Imputing a distinction where none is relevant, the *Scheerer II* Court disagreed, distinguishing

Petitioner's case from those in which *Velarde* is applicable, and finding that because the Interim Regulation stipulates that the IJ does not have jurisdiction over the adjustment applications of arriving aliens in Petitioner's position, a continuance is not warranted. *See Scheerer II*, 513 F.3d at 1254. In so holding, the *Scheerer II* Court failed to appreciate that irrespective of which agency (USCIS or EOIR) has jurisdiction over the adjustment of status application, Petitioner is entitled to have his application heard, *somewhere*. *See, e.g.*, *Merchant v. U.S. Att'y Gen.*, 461 F.3d 1375, 1379 (11th Cir. 2006) (holding that it is irrelevant whether DHS or the IJ has jurisdiction to hear the application; the BIA abused its discretion in denying motion to reopen so application could be heard in the proper place of jurisdiction where eligibility was established).

The *Scheerer II* Court also failed to appreciate that by denying arriving aliens' motions to reopen and continue, the BIA violates published procedure that EOIR adopted to implement the Interim Regulation. In the Federal Register notice adopting the Interim Regulation, EOIR explicitly recognized the rules for adjudicating motions to reopen and for continuances set forth in *Garcia* and *Velarde* and indicated that, until further regulations are issued, the BIA and immigration judges would apply these precedents to motions filed under the Interim Regulation. *See* 71 Fed. Reg. at 27,589-590.

In its prefatory comments in the Federal Register, EOIR notes that under BIA precedent, "it will ordinarily be appropriate for an immigration judge to exercise his or her discretion favorably to

grant a continuance or a motion to reopen in the case of an alien who has submitted a *prima facie* approvable visa petition and adjustment application in the course of deportation proceedings." *Id.* EOIR explicitly states that under the Interim Regulation, "USCIS, the immigration judges, and the BIA will continue to apply the discretionary factors in accordance with the general principles noted above, and guided by prior decisions." 71 Fed. Reg. at 27,590. Ultimately, "[w]hen an agency changes course, a reviewing court must be satisfied that the agency was aware of, and has given sounds reasons for, the change, and that it has shown that the new rule is consistent with the agency's statutory duties." *NLRB v. Indianapolis Mack Sales and Services, Inc.*, 802 F.2d 280, 284 (7th Cir. 1986). The BIA's failure to follow its own publicly-announced policy, without explanation, is an abuse of discretion.

The *Scheerer II* Court, however, reasoned that this comment "cannot fairly be read to establish a policy requiring the opening of proceedings even where, as here, there is no possibility that the alien's adjustment application would be adjudicated during those proceedings," and found that the BIA's reliance on the Interim Regulation was a "reasonable interpretation of that regulation." *See Scheerer II*, 513 F.3d at 1254-55. Here, again, the Court failed to appreciate that the BIA's interpretation of the Interim Regulation renders null and void the ability of arriving aliens in removal proceedings to apply for adjustment of status.

Since its ruling in *Scheerer II*, the Eleventh Circuit has further extended its holding by strictly

construing 8 C.F.R. § 1245.2(a)(1) and refusing to reopen and continue the removal proceedings of arriving aliens so that USCIS may adjudicate applications for adjustment of status even though such aliens are currently residing in the U.S. *See Pierre v. U.S. Attorney*, 2008 WL 1923091 *2 (11th Cir. 2008).

In *Pierre*, the Eleventh Circuit held that because Section 1245(a)(1)(ii) vests authority solely with USCIS to adjudicate the applications for adjustment of status of arriving aliens in removal proceedings, the appropriate course of action for Pierre, who was residing in the U.S. at the time and married to a U.S. citizen, was to file an application for adjustment of status with USCIS and wait for this application to be adjudicated, "*independent* of her removal proceedings." *See id.* Once again, the Eleventh Circuit reasoned that because the IJ does not have jurisdiction over the adjustment of status application, a continuance of the arriving alien applicant's removal proceedings is not warranted, even if she is currently residing in the U.S.

As a result of the Court's rulings in *Scheerer II* and *Pierre*, even though an arriving alien in removal proceedings is permitted under the Interim Regulation to file an application for adjustment of status, and even if that arriving alien has established, in conformity with BIA precedent, *prima facie* eligibility for adjustment of status on the grounds of her marriage to a U.S. citizen, she is effectively precluded from an adjudication of her adjustment application in the Eleventh Circuit.

B. Two circuits have disagreed with the Eleventh Circuit's analysis in *Scheerer II* and ruled that the BIA abuses its discretion when it fails to consider a motion to reopen and continue removal proceedings for arriving aliens with adjustment of status applications before USCIS, creating a true circuit split.

Since the Eleventh Circuit's decision in *Scheerer II*, both the Ninth and Second Circuit Courts of Appeals have considered the question at bar and rejected the reasoning of the Eleventh Circuit on the very grounds that the *Scheerer II* Court chose to ignore: regulatory intent, BIA precedent, and the interests of justice. Indeed, both courts held that the BIA abused its discretion in denying a motion to reopen to allow for an arriving alien in removal proceedings to stay those proceedings and obtain a determination of her adjustment of status application. Although employing different analyses, both circuits effectively reason that to hold otherwise would preclude the applicant's ability to meaningfully exercise her right to file an application for adjustment of status as provided for under the Interim Regulation.

In *Kalilu v. Mukasey*, the Ninth Circuit Court of Appeals held that the BIA abused its discretion when it determined that the Interim Regulation required that Kalilu's motion to reopen "'must be denied.'" 516 F.3d 777, 779 (9th Cir. 2008). An arriving alien in removal proceedings, Kalilu filed a

motion to reopen so that he could pursue an application for adjustment of status based on his marriage to a U.S. citizen. *See id.* Upon review, the Ninth Circuit found not only that the BIA was not precluded by the Interim Regulation to reopen removal proceedings to provide time for adjudication of a pending adjustment of status application, but also that the same regulation specifically "provide[s] an opportunity for arriving aliens in removal proceedings to apply for adjustment on the basis of a valid immigration visa petition." *See id.* (citing *Succar v. Ashcroft*, 394 F.3d 8, 9 (1st Cir. 2005); *Zheng v. Gonzales*, 422 F.3d 98, 119 (3d Cir. 2005); *Bona v. Gonzales*, 425 F.3d 663, 670-71 (9th Cir. 2005); *Scheerer I*, 445 F.3d at 1318).

The Court reasoned that because "[t]he opportunity that the Interim Rule affords for an arriving alien in removal proceedings to establish his eligibility for adjustment based on a bona fide marriage is rendered *worthless* where the BIA, as it purports to do in the present case, denied a motion to reopen (or continue) that is sought in order to provide time for USCIS to adjudicate a pending application," the BIA's denial on solely jurisdictional grounds was an unequivocal abuse of discretion. *See id.* (emphasis added). The Court further held that the BIA's denial of Kalilu's motion to reopen on solely jurisdictional grounds was in direct contravention of BIA precedent. *See id.* at 780 (citing *Matter of Velarde*, 23 I&N Dec. at 256-57; *Matter of Garcia*, 16 I&N Dec. at 657, modified on other grounds by *Matter of Arthur*, 20 I&N Dec 475 (BIA 1992) (providing that "discretion should, as a general rule, be favorably exercised where a *prima*

facie approvable visa petition and adjustment application have been submitted in the course of a deportation hearing or upon a motion to reopen.")). As a result, the Ninth Circuit remanded Kalilu's motion to the BIA for an exercise of agency discretion that must take into consideration each of the *Velarde* factors. *See id.*

Similarly, in *Sheng Gao Ni v. Board of Immigration Appeals*, the Second Circuit Court of Appeals held that the BIA erred when it denied petitioners' motions to reopen removal proceedings on purely jurisdictional grounds. 520 F.3d 125 (2nd Cir. 2008). In its analysis, the Second Circuit noted the Ninth Circuit's "dim view" of the Eleventh Circuit's holding in *Scheerer II* and remanded petitioner's motions for reconsideration by the BIA. *See id.* at 131.

In *Sheng Gao Ni*, the Second Circuit reasoned that although the BIA is correct that the Interim Regulation rests jurisdiction over petitioner's applications for adjustment of status with USCIS, the BIA erred by failing to exercise any discretion whatsoever on these grounds alone. *See id.* at 129. Significantly, the *Sheng Gao Ni* Court emphasized that the fact that petitioners were before an IJ seeking to reopen and continue their removal proceedings to apply for adjustment of status pursuant to the Interim Regulation did not mean that the IJ was being asked – or would necessarily need to have jurisdiction – to adjudicate those applications for adjustment of status in order to exercise its discretion vis-à-vis the motions to reopen and continue. *See id.* at 130 (underscoring the fact

that the "BIA did not consider . . . whether petitioners' newfound ability to file adjustment applications with the USCIS warranted a favorable exercise of its discretion to reopen and continue the proceedings and thereby lift the removal orders").

As with the *Kalilu* Court, the *Sheng Gao Ni* Court stressed that in its denial of petitioners' motions to reopen and continue, the BIA "inexplicably departed from its established policy of granting motions to reopen in order to permit the adjudication of status-adjustment applications." *See id.* at 132 n.4 (citing *Matter of Garcia*, 16 I&N Dec. at 657 ("we believe that discretion should, as a general rule, be favorably exercised where a *prima facie* approvable visa petition and adjustment application have been submitted in the course of a deportation hearing or upon a motion to reopen.")).

It is clear from the above discussion that there is a circuit split ripe for resolution. The Eleventh Circuit's holding in *Scheerer II*, and subsequently in *Pierre*, creates a fissure in justice among the circuits by endorsing the BIA's perpetuation of an absolute bar to the application for adjustment of status by arriving aliens in removal proceedings. This Honorable Court should grant *certiorari*, resolve this split, and restore consistency and justice across the circuits.

CONCLUSION

For the aforementioned reasons, the petition for writ of *certiorari* should be granted.

Respectfully submitted,

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[PUBLISH]
IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 06-14192

Agency No. A78-660-016

GERMAR SCHEERER,

Petitioner,

Versus

U.S. ATTORNEY GENERAL,
MICHAEL CHERTOFF, Secretary of DHS,
in his official capacity,

Respondent.

No. 06-15971

Agency No. A78-660-016

GERMAR SCHEERER,
a.k.a. Germar Rudolf,

Petitioner,

versus

U.S. ATTORNEY GENERAL,

Respondent.

Petitions for Review of Decisions of the
Board of Immigration Appeals

(January 15, 2008)

Before TJOFLAT, HULL and WILSON, Circuit Judges.

WILSON, Circuit Judge:

In his second appearance before us in this matter, Germar Scheerer petitions for review of the Board of Immigration Appeals' (BIA) decision denying his motion to reopen removal proceedings and its decision denying his motion to reconsider. Scheerer, who has been removed from the United States, seeks reopening of proceedings so that he may return to this country to apply for an

adjustment of status. The BIA denied Scheerer's motions on the grounds that, under an amendment to the governing regulation, Scheerer is prohibited from pursuing adjustment of status in removal proceedings and may do so only by filing an application with the United States Citizenship and Immigration Services (USCIS). Scheerer challenges the amended regulation, arguing that it, like the regulation we declared invalid in our prior decision, bars virtually all paroled aliens from applying for adjustment of status, and thus is contrary to the intent of § 245(a) of the Immigration and Nationality Act, 8 U.S.C. § 1255(a). Scheerer and the *amicus curiae* also challenge the application of the regulation to this case and argue that the BIA abused its discretion in denying Scheerer's motions. For the reasons discussed below, we deny the petitions.

I. BACKGROUND

A native and citizen of Germany, Scheerer fled that country in 1995 following his conviction for inciting racial hatred in violation of German law. *See Scheerer v. United States Att'y Gen.* (*Scheerer I*), 445 F.3d 1311, 1314 (11th Cir. 2006). He entered the United States as a conditional parolee on August 9, 2000,[1] and subsequently filed an application for

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[1] *See* 8 U.S.C. § 1182(d)(5)(A) ("The 1 Attorney General may . . . in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-bycase basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien . . . .").

asylum and withholding of removal. The Immigration Judge (IJ) denied Scheerer's claims and entered a finding that his application was frivolous. The BIA affirmed the IJ's decision without opinion, and Scheerer timely petitioned this Court for review.

While his petition was pending, Scheerer filed a motion with the BIA to reopen removal proceedings so that he could adjust his status to that of a lawful permanent resident based on his marriage to a United States citizen. The BIA denied his motion, finding that, as an arriving alien in removal proceedings,[2] Scheerer was ineligible under 8 C.F.R. § 1245.1(c)(8) to apply for an adjustment of status. Scheerer timely filed a petition for review, which we consolidated with his earlier petition. In November 2005, this Court and the Supreme Court denied Scheerer's emergency motions to stay removal pending appeal, and he was removed from the United States to Germany.

Upon our first review, we granted Scheerer's petitions in part and denied in part. We affirmed the

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[2] The definition of "arriving alien" is set forth at 8 C.F.R. § 1.1(q):

> The term arriving alien means an applicant for admission coming or attempting to come into the United States at a port-of-entry, or an alien seeking transit through the United States at a port-of-entry, or an alien interdicted in international or United States waters and brought into the United States by any means, whether or not to a designated port-of-entry, and regardless of the means of transport. An arriving alien remains an arriving alien even if paroled pursuant to section 212(d)(5) of the Act, and even after any such parole is terminated or revoked.

denial of his claim for asylum and withholding of removal, but held that the IJ's findings were insufficient to support the conclusion that Scheerer's application was frivolous. *Scheerer I*, 445 F.3d at 1317, 1318. Additionally, we held that 8 C.F.R. § 1245.1(c)(8) was an invalid regulation. *Id.* at 1322. Noting that 8 U.S.C. § 1255(a) authorizes the Attorney General to adjust the status of any alien "who was inspected and admitted or paroled into the United States," we determined that Congress intended to allow most paroled aliens to apply for an adjustment of status. *Id.* We further concluded, based on related statutory provisions, that Congress intended for virtually all parolees to be placed in removal proceedings. *Id.* at 1321. The regulation, however, barred "[a]ny arriving alien . . . in removal proceedings" from seeking adjustment of status, 8 C.F.R. § 1245.1(c)(8) (2005), thereby rendering nearly all parolees ineligible. In light of this conflict, we held that the regulation was not based on a permissible construction of the statute. *Scheerer I*, 445 F.3d at 1322. We therefore reversed the denial of Scheerer's motion to reopen and remanded the case to the BIA. *Id.*

Following our decision, the Department of Homeland Security (DHS) agreed to seek the issuance of a transportation letter that would allow Scheerer to reenter the United States to pursue his adjustment application on remand. However, in response to our *Scheerer I* ruling and to similar decisions by other circuit courts,[3] the Attorney

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[3] *See Bona v. Gonzales*, 425 F.3d 663 (9th Cir. 2005); *Zheng v. Gonzales*, 422 F.3d 98 (3d Cir. 2005); *Succar v. Ashcroft*, 394 F.3d 8 (1st Cir. 2005).

General promulgated an interim regulation repealing 8 C.F.R. § 1245.1(c)(8) and replacing it with an amended 8 C.F.R. § 1245.2(a)(1). *See* Eligibility of Arriving Aliens in Removal Proceedings to Apply for Adjustment of Status and Jurisdiction to Adjudicate Applications for Adjustment of Status, 71 Fed. Reg. 27,585, 27,591-92 (May 12, 2006). The amended regulation, unlike the former 8 C.F.R. § 1245.1(c)(8), permits arriving aliens in removal proceedings to apply for adjustment of status. In most circumstances, however, it deprives the IJ of jurisdiction to adjudicate such applications.[4] Instead, arriving aliens in removal proceedings must file adjustment applications with USCIS, a component of DHS. *See* 8 C.F.R. § 245.2(a)(1). The interim

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[4] The IJ retains jurisdiction when the following factors are present:

> (A) The alien properly filed the application for adjustment of status with USCIS while the arriving alien was in the United States;
>
> (B) The alien departed from and returned to the United States pursuant to the terms of a grant of advance parole to pursue the previously filed application for adjustment of status;
>
> (C) The application for adjustment of status was denied by USCIS; and
>
> (D) DHS placed the arriving alien in removal proceedings either upon the arriving alien's return to the United States pursuant to the grant of advance parole or after USCIS denied the application.

8 C.F.R. § 1245.2(a)(1)(ii). This exception is not applicable to Scheerer.

regulation provides that the amended 8 C.F.R. § 1245.2(a)(1) is applicable to all cases pending administrative or judicial review on or after May 12, 2006. 71 Fed. Reg. at 27,588.

On remand, the BIA relied on the interim regulation to deny Scheerer's motion to reopen. In a decision dated July 26, 2006, the BIA found that Scheerer does not fall within the narrow exception under which arriving aliens may apply for adjustment of status in removal proceedings before an IJ. Therefore, the BIA concluded, Scheerer must pursue any application for adjustment of status with USCIS. Scheerer filed a timely petition for review with this Court. Thereafter, he filed a motion to reconsider with the BIA, arguing, *inter alia*, that the BIA's decision frustrated the intent of our remand order because, as an alien previously removed, he is barred from reentering the United States,[5] and therefore is unable to pursue an adjustment application with USCIS. *See* 8 U.S.C. § 1255(a) (providing that aliens "inspected and admitted or paroled into the United States" are eligible for adjustment of status); 8 C.F.R. § 245.1(a) (limiting eligibility to apply for adjustment of status to aliens "physically present in the United States"). The BIA denied Scheerer's motion on November 2, 2006, finding that the new interim regulation is applicable

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[5] The parties disagree as to the length of the admission bar to which Scheerer is subject. The government asserts that Scheerer is inadmissable for five years, while Scheerer contends that the applicable period is ten years. *See* 8 U.S.C. § 1182(a)(9)(A). As this issue is immaterial to our disposition of the appeal, we need not resolve it.

to Scheerer's case and is binding on the BIA, and that our decision involved another regulation (*see* 8 C.F.R. § 1245.1(c)(8) (2005)). The BIA also found that it has no authority to order DHS to allow Scheerer to reenter the United States for purposes of his seeking adjustment of status. Scheerer timely petitioned for review of the BIA's decision, and we consolidated his two petitions into the present appeal.

Scheerer raises three issues for our review. First, he argues that the amended 8 C.F.R. § 1245.2(a)(1) effects the same result as that produced by the former regulation, and thus is invalid for the reasons set forth in *Scheerer I*. Second, Scheerer argues that the BIA violated due process and our *Scheerer I* remand instructions by applying the regulation to this case. Finally, Scheerer argues that the BIA's denial of his motions constitutes an abuse of discretion.

II. DISCUSSION

A. *Validity of Amended 8 C.F.R. § 1245.2(a)(1)*

The amended 8 C.F.R. § 1245.2(a)(1) provides that, in general, "[i]n the case of an arriving alien who is placed in removal proceedings, the immigration judge does not have jurisdiction to adjudicate any application for adjustment of status . . . ." Scheerer contends that this regulation is substantively identical to the former 8 C.F.R. § 1245.2(c)(8) in that it bars virtually all paroled aliens from pursuing adjustment applications. Accordingly, he argues, the amended regulation is invalid because, like its predecessor, it is contrary to

the intent of 8 U.S.C. § 1255(a). *See Scheerer I*, 445 F.3d at 1322.

The validity of the amended 8 C.F.R. § 1245.2(a)(1) is an issue of first impression in the courts of appeals. In reviewing an agency regulation interpreting a statute the agency administers, we apply the two-step inquiry outlined by the Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44, 104 S. Ct. 2778, 2781-82, 81 L. Ed. 2d 694 (1984). *See Scheerer I*, 445 F.3d at 1318. First, we must consider "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842, 104 S. Ct. at 2781. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43, 104 S. Ct. at 2781. However, "if the statute is silent or ambiguous with respect to the specific issue," we turn to the second step, which requires us to decide whether the regulation is "based on a permissible construction of the statute." *Id.* at 843, 104 S. Ct. at 2782. To uphold the agency's interpretation under this inquiry, we "need not conclude that the agency construction was the only one it permissibly could have adopted . . . or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Id.* at 843 n.11, 104 S. Ct. at 2782 n.11. "[A]ll we must decide" is whether the agency "has filled the statutory gap 'in a way that is reasonable in light of the legislature's revealed design.'" *Lopez v. Davis*, 531 U.S. 230, 242, 121 S. Ct. 714, 722, 148 L. Ed. 2d 635 (2001) (quoting *NationsBank of N.C., N.A. v. Variable Annuity Life*

Ins. Co., 513 U.S. 251, 257, 115 S. Ct. 810, 813-14, 130 L. Ed. 2d 740 (1995)).

If Congress "has not merely failed to address a precise question, but has given an 'express delegation of authority to the agency to elucidate a specific provision of the statute by regulation,' the agency's 'legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.'" *Scheerer I*, 445 F.3d at 1319 (quoting *Chevron*, 467 U.S. at 843-44, 104 S. Ct. at 2778). Deference to the agency "is especially appropriate in the immigration context where officials 'exercise especially sensitive political functions that implicate questions of foreign relations.'" *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425, 119 S. Ct. 1439, 1445, 143 L. Ed. 2d 590 (1999) (quoting *INS v. Abudu*, 485 U.S. 94, 110, 108 S. Ct. 904, 915, 99 L. Ed. 2d 90 (1988)).

We begin with the governing statute, which provides in relevant part:

> The status of an alien who was inspected and admitted or paroled into the United States . . . may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence, if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissable to the United States for permanent residence, and (3)

> an immigrant visa is immediately available to him at the time his application is filed.

8 U.S.C. § 1255(a).

We previously found that § 1255(a) is at best ambiguous as to whether the Attorney General may regulate eligibility to apply for adjustment of status. *Scheerer I*, 445 F.3d at 1321. Here, however, the "precise question at issue" is different, as the challenged regulation does not alter the eligibility standards governing adjustment applications. Rather, it removes a category of applications from the jurisdiction of the immigration courts, leaving those applications to be adjudicated by USCIS pursuant to the companion regulation 8 C.F.R. § 245.2(a)(1). Arguably, § 1255(a) unambiguously permits this action through its delegation of authority to the Attorney General to adjust aliens' status "under such regulations as he may prescribe." Nevertheless, we conclude that the validity of the regulation is more properly analyzed under the second *Chevron* step. Although Congress has allocated jurisdiction over adjustment applications to both DHS and the Department of Justice (DOJ),[6] it

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[6] Section 1255(a) refers only to adjustment of status "by the Attorney General," but Congress has transferred the adjudication functions of the former Immigration and Naturalization Service (INS) to the Secretary of Homeland Security and his delegate in USCIS. 6 U.S.C. § 271(b)(5); *see also* 6 U.S.C. § 557 (providing that references in federal law to any officer whose functions have been transferred to DHS shall be deemed to refer to DHS Secretary or other official). Congress has retained in the Department of Justice the functions of the

has not expressly stated which department has authority to adjudicate applications filed by arriving aliens in removal proceedings. Moreover, despite § 1255(a)'s broad delegation of authority, we cannot say that the statute unequivocally authorizes the Attorney General to place this class of applications outside the jurisdiction of DOJ. Given Congress's silence on these matters, we will apply *Chevron* step two and consider whether the regulation is based on a permissible construction of the statute.

In *Scheerer I*, we determined that § 1255 contemplates that "parolees—arriving aliens, virtually all of whom are placed in removal proceedings—should be eligible to apply for an adjustment of status." 445 F.3d at 1322. We invalidated 8 C.F.R. § 1245.2(c)(8) because it "exclude[d] the same class from eligibility." *Id.* We thus agreed with the Third Circuit's conclusion that, "'[w]hile the statute may be ambiguous enough to allow for some regulatory eligibility standards, it does not so totally abdicate authority to the Attorney General as to allow a regulation . . . that essentially reverses the eligibility structure set out by Congress.'" *Id.* (first alteration in original) (quoting *Zheng v. Gonzales*, 422 F.3d 98, 120 (3d Cir. 2005)).

Scheerer argues that the amended regulation implicates the same eligibility concern. We disagree. Unlike the former regulation, the amended 8 C.F.R. § 1245.2(a)(1) does not provide that arriving aliens in removal proceedings are ineligible for adjustment of

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Executive Office for Immigration Review (EOIR), which includes the immigration courts. 8 U.S.C. § 1103(g)(1).

status. Such aliens still may file adjustment applications, but generally must do so with USCIS rather than before an IJ. Thus, while the former regulation operated as an absolute bar to adjustment of status for these aliens, the amended regulation—together with the DHS regulation 8 C.F.R. § 245.2(a)(1)—merely delineates the forum in which their applications are to be adjudicated. Given this distinction, Scheerer's contention that the amended regulation is functionally equivalent to the regulation we invalidated in *Scheerer I* is without merit.[7]

Moreover, the amended 8 C.F.R. § 1245.2(a)(1) reflects a reasonable construction of the statute's delegation of authority to the Attorney General. As noted, where Congress "has explicitly left a gap for the agency to fill," we are required to give controlling weight to the agency's interpretation unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 843-44, 104 S. Ct. at 2778. Nothing in § 1255(a) or in related statutory provisions convinces us that such a finding is warranted as to the amended regulation. Indeed, the regulation appears fully consistent with the broader statutory framework governing adjustment applications, in which Congress has divided

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[7] Scheerer offers no empirical support for his contention that the amended regulation bars "virtually all" paroled aliens from pursuing the merits of their adjustment applications. The absence of such evidence further distinguishes this case from *Scheerer I*, where it was apparent that the vast majority of parolees would be placed in removal proceedings and thus would be ineligible for adjustment of status under the former 8 C.F.R. § 1245.1(c)(8). *See Scheerer I*, 445 F.3d at 1322.

adjudication functions between DOJ and DHS and has authorized those departments to fill the gap as to specific application procedures. Accordingly, we hold that the Attorney General did not exceed his authority in promulgating the amended 8 C.F.R. § 1245.2(a)(1), and we decline to declare the regulation invalid.[8]

B. *Application of Regulation to Scheerer*

Scheerer next argues that due process required the BIA to consider his motion to reopen under the law as it existed at the time of our remand, rather than under the amended regulation. Relying on cases in which courts have declined to apply new rules of law to prior conduct, Scheerer contends that the BIA's decisions involve an improper retroactive application of the amended regulation to his case. Relatedly, Scheerer and the *amicus* also contend that the BIA's application of the amended regulation violates our *Scheerer I* remand instructions.

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[8] We also note that the current application framework is similar to that which existed before the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009. Prior to IIRIRA (which replaced the former deportation and exclusion proceedings with a single "removal" proceeding), INS generally had exclusive jurisdiction over adjustment applications filed by aliens in exclusion proceedings. *See In re Castro-Padron*, 21 I & N Dec. 379, 379-80 (BIA 1996); 71 Fed. Reg. at 27,586. As noted, *see supra* note 6, Congress has transferred INS's adjudication functions to USCIS. The similarity of these two regulatory schemes lends further support to our conclusion that the Attorney General's construction of § 1255(a) is reasonable.

We review the BIA's denial of a motion to reopen and its denial of a motion to reconsider for abuse of discretion. *Abdi v. U.S. Att'y Gen.*, 430 F.3d 1148, 1149 (11th Cir. 2005) (per curiam); *Assa'ad v. United States Att'y Gen.*, 332 F.3d 1321, 1341 (11th Cir. 2003). To the extent that the BIA's decisions were based on a legal determination, our review is *de novo*. *Li v. U.S. Att'y Gen.*, 488 F.3d 1371, 1374 (11th Cir. 2007) (per curiam). However, we defer to the BIA's interpretation of the regulations governing it "if the interpretation . . . is reasonable and does not contradict the clear intent of Congress." *Silva v. U.S. Att'y Gen.*, 448 F.3d 1229, 1243 (11th Cir. 2006).

Scheerer's due process argument fails for two reasons. First, the amended 8 C.F.R. § 1245.2(a)(1) does not have retroactive effect. "A statute or administrative regulation does not operate retroactively merely because it applies to prior conduct; rather a statute or regulation has retroactive effect if 'would impair rights a party possessed when he acted, increase [his] liability for past conduct, or impose new duties with respect to transactions already completed.'" *Ga. Power Co. v. Teleport Commc'ns Atlanta, Inc.*, 346 F.3d 1033, 1043 (11th Cir. 2003) (alteration in original) (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280, 114 S. Ct. 1483, 1505, 128 L. Ed. 2d 229 (1994)). Jurisdictional statutes and regulations "speak to the power of the court rather than to the rights or obligations of the parties," *Landgraf*, 511 U.S. at 274, 114 S. Ct. at 1502 (internal quotation marks omitted), and therefore are generally not considered impermissibly retroactive. *See Labojewski v. Gonzales*, 407 F.3d 814, 819 (7th Cir. 2005); *see also*

Hughes Aircraft Co. v. United States ex rel. Schumer, 520 U.S. 939, 951, 117 S. Ct. 1871, 1878, 138 L. Ed. 2d 135 (1997) ("Statutes merely addressing *which* court shall have jurisdiction to entertain a particular cause of action can fairly be said merely to regulate the secondary conduct of litigation and not the underlying primary conduct of the parties."). As discussed above, the amended 8 C.F.R. § 1245.2(a)(1) merely defines the jurisdiction of the immigration courts in relation to that of USCIS. Therefore, applying this regulation to Scheerer's motion "takes away no substantive right but simply changes the tribunal that is to hear the case." *Landgraf*, 511 U.S. at 274, 114 S. Ct. at 1502 (internal quotation marks omitted). While such application may "upset[] *expectations* based in prior law," *id.* at 269, 114 S. Ct. at 1499 (alteration and emphasis added), it does not impair any of Scheerer's rights or otherwise operate retroactively.[9]

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[9] Scheerer's argument that the amended r 9 egulation is a bill of attainder likewise is without merit. We have never held that the Constitution's Bill of Attainder Clause, U.S. Const. art. I, § 9, cl. 3, is applicable to Executive Branch regulations, and other courts have suggested to the contrary. *See, e.g.*, *Paradissiotis v. Rubin*, 171 F.3d 983, 988-89 (5th Cir. 1999); *Walmer v. U.S. Dept. of Defense*, 52 F.3d 851, 855 (10th Cir. 1995); *Korte v. Office of Pers. Mgmt.*, 797 F.2d 967, 972 (Fed. Cir. 1986). Even assuming the Clause applies, however, it is clear that the amended regulation is not invalid on these grounds. A bill of attainder is "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 468, 97 S. Ct. 2777, 2803, 53 L. Ed. 2d 867 (1977). The amended 8 C.F.R. § 1245.2(a)(1) is a generally applicable jurisdictional rule. It does not single out any individual or group and does not impose punishment of any kind.

Second, Scheerer cannot prevail on his due process claim because he has no constitutionally protected interest in purely discretionary forms of relief. "To establish due process violations in removal proceedings, aliens must show that they were deprived of liberty without due process of law, and that the asserted errors caused them substantial prejudice." *Lonyem v. United States Att'y Gen.*, 352 F.3d 1338, 1341-42 (11th Cir. 2003) (per curiam). The decision to grant or deny a motion to reopen or a motion to reconsider is within the discretion of the BIA, 8 C.F.R. § 1003.2(a), and we have recognized that this discretion is "very broad." *Anin v. Reno*, 188 F.3d 1273, 1279 (11th Cir. 1999) (per curiam). Adjustment of an alien's status likewise is a discretionary form of relief. 8 U.S.C. § 1255(a). We have held that "the failure to receive relief that is purely discretionary in nature does not amount to a deprivation of a liberty interest." *Garcia v. Att'y Gen.*, 329 F.3d 1217, 1224 (11th Cir. 2003) (per curiam). Because Scheerer has no constitutionally protected interest either in the granting of his motions or in adjustment of status, he cannot establish a due process violation based on the BIA's decisions.

We likewise reject the argument that the BIA's application of the amended regulation to this case violates our remand instructions in *Scheerer I*. In those instructions, we did not order the BIA to reopen proceedings or to remand Scheerer's case to an IJ for adjudication of his adjustment application. We merely directed the BIA to conduct "further proceedings consistent with [our] opinion." *Scheerer I*, 445 F.3d at 1322. The BIA complied with this

requirement, as neither of its orders relied on the invalidated 8 C.F.R. § 1245.2(c)(8) or otherwise conflicted with our decision. *Scheerer I* in no way precluded the BIA from relying on the amended regulation, which, as noted, was expressly made applicable to all cases pending administrative or judicial review on or after May 12, 2006. While our opinion established that Scheerer could not be declared ineligible for adjustment of status based on the "mere fact of removal proceedings," *id.*, it did not create any requirement that his adjustment application be adjudicated by an immigration court.

C. *Abuse of Discretion*

Finally, Scheerer and the *amicus* argue that the BIA abused its discretion in denying Scheerer's motions. They contend that, even if the BIA now lacks jurisdiction to adjudicate Scheerer's adjustment application, it has not been deprived of jurisdiction over his motion to reopen. Therefore, they suggest, the BIA should have granted the motion (thereby allowing Scheerer to return to the United States pursuant to his prior agreement with DHS) and continued his case until USCIS had an opportunity to pass on his adjustment application.

In support of this argument, Scheerer and the *amicus* cite several cases in which we found an abuse of discretion in the denial of a continuance during the pendency of a visa petition where the alien was seeking adjustment of status. *See Haswanee v. U.S. Att'y Gen.*, 471 F.3d 1212, 1218 (11th Cir. 2006) (per curiam); *Merchant v. U.S. Att'y Gen.*, 461 F.3d 1375, 1379 (11th Cir. 2006); *Bull v.*

INS, 790 F.2d 869, 872 (11th Cir. 1986) (per curiam). Scheerer and the *amicus* also direct our attention to *In re Velarde-Pacheco*, 23 I. & N. Dec. 253, 256 (BIA 2002), in which the BIA held that, where certain five factors are met, a motion to reopen may be granted to provide an alien the opportunity to pursue an adjustment application based on a marriage entered into after the commencement of proceedings.

Scheerer's reliance on these decisions is misplaced, however, because the petitioners involved were not arriving aliens and thus were subject to a different regulatory framework than that which governs here. Under the applicable regulations, the petitioners in the earlier decisions were entitled to initiate or renew adjustment applications with the immigration court during removal proceedings. *See* 8 C.F.R. § 1245.2(a)(1)(i), (a)(5)(ii). Thus, continuances were warranted in those cases because an IJ would have authority to adjudicate the petitioners' respective applications once the statutory prerequisites to adjustment of status were satisfied. By contrast, under 8 C.F.R. § 1245.2(a)(1)(ii), the immigration courts have no jurisdiction over adjustment applications filed by aliens in Scheerer's position. Therefore, his application would never return to the immigration courts even if denied by USCIS. Given these circumstances—in which there is no possibility that Scheerer's adjustment application would be adjudicated during removal proceedings—the BIA did not abuse its discretion in denying Scheerer's motions.

Scheerer and the *amicus* also contend that the BIA's decisions conflict with the intent of the

amended regulation as reflected in DOJ's published implementation procedures. They note that the Federal Register notice setting forth the regulation states that "it will ordinarily be appropriate for an immigration judge to exercise his or her discretion favorably to grant a continuance or motion to reopen in the case of an alien who has submitted a prima facie approvable visa petition and adjustment application in the course of a deportation hearing." 71 Fed. Reg. at 27,589. This comment, however, merely reiterates the principles set forth in *Velarde-Pacheco* and similar cases. It cannot fairly be read to establish a policy requiring the reopening of proceedings even where, as here, there is no possibility that the alien's adjustment application would be adjudicated during those proceedings. We conclude that the BIA's reliance on the amended 8 C.F.R. § 1245.2(a)(1) as grounds for denying Scheerer's motions reflects a reasonable interpretation of that regulation, which was intended to clarify that applications such as Scheerer's "will be adjudicated *only* by U.S. Citizenship and Immigration Services (USCIS)." 71 Fed. Reg. at 27,587 (emphasis added). We therefore find no abuse of discretion in the BIA's decisions.[10]

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[10] In view of the highly unusual circumstances of this case, we note that there may be avenues of relief still available to Scheerer. The government's brief emphasizes DHS's readiness to "take steps that would permit Scheerer to apply for adjustment of status within the applicable regulatory framework." According to the government, one such option would be for Scheerer to file an adjustment application with USCIS accompanied by a request that the applicable admission bar not be held against him for purposes of his seeking adjustment of status. Alternatively, the government suggests that Scheerer could request a grant of advance parole into the

III. CONCLUSION

For the foregoing reasons, we deny the petitions for review.

PETITIONS DENIED.

United States following his release from prison in Germany in order to pursue adjustment of status at that time. The government indicates that DHS is willing to entertain either of these proposals.

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JAN 15, 2008
THOMAS K. KAHN
CLERK

[ENTERED: JANUARY 15, 2008]

[PUBLISH]
IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 06-14192

Agency No. A78-660-016

GERMAR SCHEERER,

Petitioner,

Versus

U.S. ATTORNEY GENERAL,
MICHAEL CHERTOFF, Secretary of DHS,
in his official capacity,

Respondent.

No. 06-15971

Agency No. A78-660-016

GERMAR SCHEERER,
a.k.a. Germar Rudolf,

Petitioner,

versus

U.S. ATTORNEY GENERAL,

Respondent.

Petitions for Review of Decisions of the
Board of Immigration Appeals

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered:	January 15, 2008
For the Court:	Thomas K. Kahn, Clerk
By:	Gilman, Nancy

ISSUED AS MANDATE
MAR 11 2008
U.S. COURT OF APPEALS
ATLANTA, GA.

Decision of the Board of Immigration Appeals

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

File: A78-660-016 - Atlanta
Date: MAR - 3 2005

In Re: SCHEERER, GERMAR

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: R. Scott Oswald, Esquire

ORDER:

PER CURIAM. The respondent moves the Board pursuant to 8 C.F.R. § 1003.2 to reopen our decision dated November 8, 2004. As an arriving alien, the respondent is ineligible to adjust status as an arriving alien who is in removal proceedings pursuant to section 240 of the Act, 8 U.S.C. § 1229a. 8 C.F.R. § 1245.1(c)(8). The regulation at 8 C.F.R. § 1245.1(c)(8) provides that an arriving alien who is in removal proceedings pursuant to section 240 of the Act is ineligible to apply for adjustment of status to that of a lawful permanent resident alien under section 245 of the Act. See 8 C.F.R. § 1245.1(c)(8). Inasmuch as the Immigration Judge found the respondent to be an arriving alien in removal

proceedings pursuant to section 240 of the Act (see I.J. at 3), the respondent is ineligible to adjust his status to the of a lawful permanent resident alien under either section 245(a) or 245(i) of the Act before this Board of the Immigration Judge. See also Matter of Artigas, 23 I&N Dec. 99 (BIA 2001); Matter of Castro, 21 I&N Dec. 379 (BIA 1996). Accordingly, the motion is denied.

/s/

FOR THE BOARD

Decision of the Board of Immigration Appeals

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

File: A78 660 016 - Atlanta
Date: NOV - 8 2004

In Re: GERMAR SCHEERER

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: R. Scott Oswald, Esquire

ON BEHALF OF DHS: John R. Doolittle
Assistant Chief Counsel

REISSUED DECISION

ORDER:

PER CURIAM. To correct a defect in the service of the Board's previous decision, the Board's order of September 17, 2004, in this matter is hereby vacated and the proceedings reinstated upon the Board's own motion. 8 C.F.R. § 1003.2(a). An order in the matter is hereby issued as of this date, incorporating by reference the text of the attached vacated order.

/s/
FOR THE BOARD

Decision of the Board of Immigration Appeals

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

File: A78-660-016 - Atlanta
Date: SEP 17 2004

In Re: SCHEERER, GERMAR

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Oswald, R. Scott

ON BEHALF OF DHS: John R. Doolittle, II,
Assistant Chief Counsel

ORDER:

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 1003.1(e)(4).

/s/
FOR THE BOARD

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FILED
AUG 15 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-1555

In the Supreme Court of the United States

GERMAR SCHEERER, AKA GERMAR RUDOLF,
PETITIONER

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

GREGORY G. GARRE
Acting Solicitor General
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QUESTION PRESENTED

Whether the Board of Immigration Appeals abused its discretion in denying petitioner's motion to reopen his removal proceedings in order to facilitate petitioner's attempt to adjust his status to that of a lawful permanent resident, in light of a regulation that vests exclusive authority to consider applications for adjustment of status filed by arriving aliens in certain officials in the Department of Homeland Security.

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In the Supreme Court of the United States

No. 07-1555

GERMAR SCHEERER, AKA GERMAR RUDOLF, PETITIONER

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 513 F.3d 1244. The decisions of the Board of Immigration Appeals that are the subject of the current petitions for judicial review (C.A. R.E., Vol. II, tab 10 and C.A. R.E., Vol. II, tab 13, at 7-8, respectively) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 15, 2008. On March 26, 2008, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including June 13, 2008, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Legal immigration into the United States is controlled by the issuance of immigrant visas abroad by consular officers acting under the authority of the Secretary of State. See 8 U.S.C. 1154(b), 1201(a). Congress has also authorized the Attorney General and the Secretary of Homeland Security to relieve certain qualifying aliens who are already in the United States of the need to depart and obtain an immigrant visa through consular processing by adjusting their status to that of a lawful permanent resident. See 8 U.S.C. 1255(a); *Randall* v. *Meese*, 854 F.2d 472, 473-474 (D.C. Cir. 1988) (R.B. Ginsburg, J.), cert. denied, 491 U.S. 904 (1989). Adjustment of status is discretionary and is "a matter of grace, not of right." *Elkins* v. *Moreno*, 435 U.S. 647, 667 (1978).

2. a. Petitioner is a native and citizen of Germany. Pet. App. 3a. In 1995, petitioner fled Germany after being convicted of inciting racial hatred in violation of German law, and he eventually traveled to the United States. *Ibid.* On August 9, 2000, petitioner was granted immigration parole,[1] and he subsequently filed applications for asylum and withholding of removal. *Id.* at 3a-4a. On April 2, 2001, the former Immigration and Naturalization Service issued a Notice to Appear, charging that petitioner was an inadmissible arriving alien who

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[1] 8 U.S.C. 1182(d)(5)(A) confers authority to parole from immigration custody "any alien applying for admission" who would otherwise be detained until the question of admissibility is resolved. Immigration parole is "simply a device through which needless confinement is avoided while administrative proceedings are conducted"; a paroled alien is "still in theory of law at the boundary line." *Leng May Ma* v. *Barber*, 357 U.S. 185, 189, 190 (1958) (quoting *Kaplan* v. *Tod*, 267 U.S. 228, 230 (1925)).

had failed to depart from the United States within the 90-day period for which he had been granted immigration parole. A.R. 2864.

b. On June, 2003, an immigration judge (IJ) issued a decision and order concluding that petitioner was properly categorized as an arriving alien and that he was inadmissible to the United States. C.A. R.E., Vol. I, tab 1, at 428-429; see 8 C.F.R. 1.1(q) (defining "arriving alien" as including "an applicant for admission coming or attempting to come into the United States at a port-of-entry," even if that person has been granted immigration parole). The IJ denied petitioner's applications for asylum and withholding of removal, and it made a specific finding that petitioner's application for asylum had been "frivolous." C.A. R.E., Vol. I, tab 1, at 424. See 8 U.S.C. 1158(d)(6) (providing that an alien who knowingly files a frivolous application for asylum after being warned of the consequences of doing so "shall be permanently ineligible for any" immigration benefits). The IJ also denied petitioner's request for voluntary departure, and ordered him removed to Germany. C.A. R.E., Vol. I, tab 1, at 424.

On November 8, 2004, the Board of Immigration Appeals (BIA or Board) issued an order that affirmed the IJ's June 3, 2003, decision without opinion. Pet. App. 26a-27a.

c. On December 7, 2004, petitioner filed with the BIA a motion to reopen his removal proceedings and to remand his case to the IJ in order to permit him to apply for adjustment of status. C.A. R.E., Vol. I, tab 3. In that motion, petitioner asserted that he had married a United States citizen on September 11, 2004, nearly two months before the BIA's November 8, 2004, decision. *Id.* at 2. Petitioner further asserted that, on December

6, 2004, his United States citizen spouse had filed an immediate relative (I-130) visa petition on his behalf with the United States Citizenship and Immigration Service (USCIS) in the Department of Homeland Security (DHS). *Ibid.*[2] Petitioner acknowledged that the IJ had specifically concluded that his asylum application had been frivolous and that this finding would ordinarily render him ineligible for adjustment of status, *id.* at 3, but he argued that the IJ had failed to comply with the regulations that govern the making of such a finding, *id.* at 3-4. As relief, petitioner asked the Board to "remand this case to the Immigration Court with instructions" to give him an opportunity to contest the IJ's frivolousness finding "and subsequently adjudicate his application for adjustment of status." *Id.* at 4.

On March 3, 2005, the BIA denied petitioner's motion to reopen its November 8, 2004, decision. Pet. App. 24a-25a. The Board cited (*id.* at 24a) former 8 C.F.R. 1245.1(c)(8) (2005), which provided that "[a]ny arriving alien who is in removal proceedings" was "ineligible to apply for adjustment of status."

d. Petitioner filed timely petitions for review with respect to the BIA's November 8, 2004, and March 3, 2005, decisions, which the court of appeals consolidated. In November 2005, petitioner was removed to Germany after the court of appeals and this Court denied motions to stay enforcement of his removal order. Pet. App. 4a.[3]

e. On April 13, 2006, the court of appeals granted the petitions for review in part and denied them in part.

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[2] We have been advised by DHS that the I-130 petition filed by petitioner's wife was approved on October 19, 2005.

[3] We have been advised by DHS that German officials have advised that petitioner is currently incarcerated in Germany for violations of German law and is expected to be released in July 2009.

Scheerer v. *United States Att'y Gen.*, 445 F.3d 1311 (11th Cir. 2006) (*Scheerer I*). The court affirmed the denial of petitioner's claims for asylum and withholding of removal. *Id.* at 1317. The court vacated the finding that petitioner's application for asylum had been frivolous, concluding that the IJ's determinations about "the legal insufficiency of [petitioner's] claim and an adverse credibility determination * * * were insufficient to support a finding of frivolousness." *Id.* at 1318; see *ibid.* (stating that, in order to deem an application for asylum frivolous within the meaning of the relevant statute, an IJ must "specifically find material elements of [the] asylum application were deliberately fabricated"); 8 C.F.R. 208.20.

Finally, the court of appeals determined that former 8 C.F.R. 1245.1(c)(8) (2005)—the provision that made arriving aliens who were in removal proceedings categorically ineligible for adjustment of status—was "invalid because it conflicts with congressional intent as expressed in the governing statute, 8 U.S.C. § 1255(a)." *Scheerer I*, 445 F.3d at 1318; see *id.* at 1318-1322. The court of appeals remanded the matter to the BIA for further proceedings "consistent with this opinion." *Id.* at 1322.

3. *Scheerer I* was one of a number of conflicting court of appeals decisions about the validity of former 8 C.F.R. 1245.1(c)(8) (2005).[4] On May 8, 2006, the At-

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[4] Compare *Succar* v. *Ashcroft*, 394 F.3d 8, 36 (1st Cir. 2005) (concluding that the regulation was invalid), *Zheng* v. *Gonzales*, 422 F.3d 98, 119-120 (3d Cir. 2005) (same), and *Bona* v. *Gonzales*, 425 F.3d 663, 668-670 (9th Cir. 2005) (same), with *Momin* v. *Gonzales*, 447 F.3d 447, 459-461 (5th Cir.) (upholding the regulation), opinion vacated, 462 F.3d 497 (5th Cir. 2006), and *Mouelle* v. *Gonzales*, 416 F.3d 923, 930 (8th Cir. 2005) (same), cert. granted and judgment vacated, 548 U.S. 901 (2006).

torney General and the Secretary of Homeland Security (Secretary) promulgated an interim rule with request for comments (Interim Rule) in order to address that conflict. See 71 Fed. Reg. 27,587 (2006). The Interim Rule repealed former 8 C.F.R. 1245.1(c)(8) (2005). See 71 Fed. Reg. at 27,591. In its place, the Interim Rule promulgated 8 C.F.R. 245 2(a)(1), which provides that USCIS has exclusive "jurisdiction to adjudicate an application for adjustment of status filed by any alien, unless the immigration judge has jurisdiction to adjudicate the application under 8 C.F.R. 1245.2(a)(1)." See 71 Fed. Reg. at 27,591.

The Interim Rule also promulgated 8 C.F.R. 1245(a)(1)(ii), which governs applications for adjustment of status filed by "an arriving alien who is placed in removal proceedings." 8 C.F.R. 1245(a)(1)(ii); see 71 Fed. Reg. at 27,591. Subject to "only one narrow exception * * * for an alien who leaves the United States while an adjustment application is pending with USCIS, and then returns under a grant of advance parole," *id.* at 27,587-27,588, that provision provides that "the immigration judge does not have jurisdiction to adjudicate any application for adjustment of status" filed by an arriving alien who is in removal proceedings, 8 C.F.R. 1245.2(a)(1)(ii); see 8 C.F.R. 1245.2(a)(1)(ii)(A)-(D); 71 Fed. Reg. at 27,587-27,588 (describing this rule as "consistent with current practice, under longstanding regulations limiting the jurisdiction of the immigration judges in this context").[5] Finally, the Interim Rule pro-

[5] In contrast, 8 C.F.R. 1245.2(a)(1)(i)—which was also adopted as part of the Interim Rule, see 71 Fed. Reg. at 27,591—provides that an IJ "has exclusive jurisdiction to adjudicate any application for adjustment of status" filed by "any alien who has been placed in deportation

vides that it is "applicable to all cases pending administrative or judicial review on or after May 12, 2006." *Id.* at 27,588.

4. a. On July 26, 2006, the BIA issued its decision on remand from the court of appeals. The Board noted that petitioner "is an arriving alien who does not come within the narrow exception" to the Interim Rule's general rule that USCIS has exclusive jurisdiction to consider applications for adjustment of status by arriving aliens. C.A. R.E., Vol. II, tab 10, at 2. Accordingly, the BIA concluded that petitioner "must pursue any application for adjustment of status with [USCIS], independent of these removal proceedings," and it denied his "motion to reopen to apply for adjustment of status before the Immigration Judge." *Ibid.*

b. Petitioner filed a motion for reconsideration of the Board's July 26, 2006, decision. C.A. R.E., Vol. II, tab 12. In that motion, petitioner argued that the BIA's renewed denial of his motion to reopen was inconsistent with the remand order from the court of appeals. *Id.* at 2. Petitioner also asserted that application of the Interim Rule to his case had "a perverse effect" because, as a consequence of his removal to Germany and his resulting inadmissibility, "he will not be able to reenter the United States * * * to take advantage of the new regulation." *Id.* at 2-3; see 8 U.S.C. 1182(a)(9)(A)(i) and (ii) (prescribing various periods of inadmissibility for aliens previously ordered removed from the United States). Petitioner also argued that "DHS must allow [him] back into the United States to pursue his adjust-

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proceedings or in removal proceedings (other than as an arriving alien)."

ment of status application." C.A. R.E., Vol. II, tab 12, at 3.

On November 2, 2006, the BIA issued an order denying petitioner's motion for reconsideration. C.A. R.E., Vol. II, tab 13, at 7-8. The Board observed that the procedures established by the Interim Rule "are clearly applicable to this case," *id.* at 7, and it stated that it had "no authority to order DHS to allow [petitioner's] return to the United States," *id.* at 8.[6]

5. Petitioner filed new petitions for review with respect to the BIA's July 26, 2006, and November, 2, 2006, decisions, which the court of appeals consolidated. On January 15, 2008, the court of appeals issued the decision that is at issue in this petition for a writ of certiorari and denied both petitions for review. Pet. App. 1a-21a.

The court of appeals' analysis had three parts. First, the court of appeals concluded that the Interim Rule is valid under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). The court concluded that "the 'precise question at issue' is different" than in *Sheerer I*, because the Interim Rule "does not alter the eligibility standards governing adjustment applications," but rather "removes a category of applications from the jurisdiction of the immigration courts, leaving those applications to be adjudicated by USCIS." Pet. App. 11a. The court determined that the governing statutory provisions are silent with respect to the permissibility of such an approach, *id.* at 11a-12a, and that the regulation "appears fully consis-

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[6] We have been advised by DHS that petitioner filed an application for adjustment of status with USCIS on February 21, 2008. But see 8 U.S.C. 1255(a) (stating that an alien must be in the United States in order to obtain lawful permanent resident status by way of an application for adjustment of status); 8 C.F.R. 245.1(a) (same).

tent with the broader statutory framework governing adjustment applications, in which Congress has divided adjudication functions between [the Department of Justice] and DHS and has authorized those departments to fill the gaps as to specific application procedures, *id.* at 13a-14a.

Second, the court of appeals concluded that the application of the Interim Rule to petitioner's case neither had a constitutionally impermissible retroactive effect, Pet. App. 15a-16a, nor violated its mandate in *Scheerer I*, *id.* at 17a-18a. The court noted that although its previous decision "established that [petitioner] could not be declared ineligible for adjustment of status based on the 'mere fact of removal proceedings,' it did not create any requirement that his adjustment application be adjudicated by an immigration court" rather than USCIS. *Id.* at 18a (citation omitted).

Third, the court of appeals held that the BIA had not abused its discretion in denying petitioner's motion to reopen his removal proceedings. Pet. App. 18a-20a. The court acknowledged that several of its own decisions had "found an abuse of discretion in the denial of a continuance during the pendency of a visa petition where the alien was seeking adjustment of status," and that the BIA had previously held "that, when certain five factors are met, a motion to reopen may be granted to provide an alien the opportunity to pursue an adjustment application based on a marriage entered into after the commencement of [removal] proceedings." *Id.* at 18a-19a (citing, *inter alia*, *In re Velarde-Pacheco*, 23 I. & N. Dec. 253 (B.I.A. 2002)). But the court explained that the aliens in those cases "were not arriving aliens and thus were subject to a different regulatory framework than that which governs here." *Id.* at 19a. The court of ap-

peals stated that, in the category of cases at issue in the previous decisions, "an IJ would have authority to adjudicate the petitioners' respective applications once the statutory prerequisites to adjustment of status were satisfied." *Ibid.* Cf. 8 C.F.R. 1245.2(a)(1)(i) (providing that IJs have "exclusive jurisdiction to adjudicate any application for adjustment of status" filed by "any alien who has been placed in deportation proceedings or in removal proceedings (other than as an arriving alien)"). Here, in contrast, under the Interim Rule, "the immigration courts have no jurisdiction over adjustment applications filed by aliens in [petitioner's] position," and petitioner's application for adjustment of status "would never return to the immigration courts even if denied by USCIS." Pet. App. 19a.

The court of appeals also rejected petitioner's contention that the BIA's refusal to reopen his removal proceedings conflicted "with the intent of the [Interim Rule] as reflected in [the Department of Justice's] published implementation procedures." Pet. App. 19a-20a. A portion of the explanatory text that accompanied the Interim Rule states that previous BIA decisions had recognized that "it will ordinarily be appropriate for an immigration judge to exercise his or her discretion favorably to grant a continuance or motion to reopen in the case of an alien who has submitted a prima facie approvable visa petition and adjustment application in the course of a deportation hearing." 71 Fed. Reg. at 27,589. The court of appeals concluded, however, that that statement "merely reiterates the principles set forth in *Velarde-Pacheco* and similar cases" and "cannot fairly be read to establish a policy requiring the reopening of proceedings even where, as here, there is no possibility that the alien's adjustment application would be adjudi-

cated during those proceedings." Pet. App. 20a. Accordingly, the court of appeals concluded that the BIA's reliance on the Interim Rule in denying petitioner's motion to reopen his removal proceedings "reflects a reasonable interpretation of that regulation, which was intended to clarify that applications such as [petitioner's] 'will be adjudicated *only* by [USCIS].'" *Ibid.* (quoting 71 Fed. Reg. at 27,587) (emphasis added).[7]

ARGUMENT

The issue presented by this petition for a writ of certiorari is a narrow one. Petitioner expressly states (Pet. 6 n.4) that he is no longer challenging the validity of the Interim Rule, including the portion of the Interim Rule that provides that applications for adjustment of status filed by arriving aliens generally fall within the exclusive jurisdiction of USCIS. The petition for a writ of certiorari likewise does not challenge: (i) the BIA's conclusion that petitioner was properly classified as an arriving alien at the time he filed his motion to reopen his removal proceedings; (ii) the court of appeals' conclusion that the procedures set forth in the Interim Rule may validly be applied to petitioner's case; or (iii) the BIA's denial of petitioner's motion to reconsider its previous denial of his motion to reopen. Petitioner likewise does not contend that the BIA failed to give an adequate *explanation* of its decision to deny his motion to reopen.

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[7] The court of appeals also emphasized that, "[i]n view of the highly unusual circumstances of this case," "there may be avenues of relief still available" to petitioner. Pet. App. 20a n.10. The court noted that the government had stated in its brief that DHS was willing "to 'take steps that would permit [petitioner] to apply for adjustment of status within the applicable regulatory framework,'" and it identified two methods through which petitioner might be able to do so. *Ibid.*

Instead, the sole issue of which petitioner seeks this Court's review is whether—assuming the validity of the Interim Rule—the BIA "abuse[d] its discretion as a matter of law" in denying his motion to reopen. Pet. i, see Pet. 1, 6-17.

Further review of that question is not warranted. The court of appeals' decision is correct. There is no clear conflict among the court of appeals over the specific question presented here, and, even if there were such a conflict, it would be narrow and recently arising and might well be resolved without this Court's intervention. Finally, this case would be a poor vehicle in which to consider the issue upon which petitioner seeks review.

1. The court of appeals correctly held that the BIA did not abuse its discretion in denying petitioner's motion to reopen his removal proceedings. The purpose of a motion to reopen is to present "new facts" that may bear on an alien's eligibility for relief. 8 U.S.C. 1229a(c)(7)(B). "The decision to grant or deny a motion to reopen * * * is within the discretion of the Board," 8 C.F.R. 1003.2(a), and this Court has recognized that "[t]here are at least three independent grounds on which the BIA may deny a motion to reopen." *INS* v. *Abudu*, 485 U.S. 94, 104 (1988). First, the Board may deny reopening if it concludes that "the movant has not established a prima facie case for the underlying substantive relief sought." *Ibid.* "Second, the BIA may hold that the movant has not introduced previously unavailable, material evidence." *Ibid.* And third, "in cases in which the ultimate grant of relief is discretionary"—including adjustment of status—"the BIA may leap ahead, as it were, over the two threshold concerns * * *, and simply determine that even if they were met,

the movant would not be entitled to the discretionary grant of relief." *Id.* at 105.

In this case, the BIA correctly denied reopening on the ground that petitioner "ha[d] not established a prima facie case for the underlying substantive relief sought." *Abudu*, 485 U.S. at 104. In his motion to reopen, petitioner asked the BIA to "remand this case to the Immigration Court with instructions to * * * adjudicate his application for adjustment of status." C.A. R.E., Vol. I, tab 3, at 4. The BIA construed petitioner's motion in accordance with its terms, twice stating that petitioner had requested reopening "to apply for adjustment of status before the Immigration Judge." C.A. R.E., Vol. II, tab 10, at 1-2. But as the Board noted (*id.* at 2), the Interim Rule makes clear that IJs lack authority to adjudicate applications for adjustment of status filed by aliens in petitioner's position. See 8 C.F.R. 1245.2(a)(1)(ii). The IJ's conceded inability to grant the only form of "substantive relief sought" in petitioner's motion to reopen, *Abudu*, 485 U.S. at 104, provided more than sufficient reason for the BIA to deny that motion.

The court of appeals correctly rejected petitioner's contrary arguments. As the court explained (Pet. App. 18a-19a), certain other categories of aliens may—indeed, must—pursue any application for adjustment of status before an IJ as part of their removal proceedings. See 8 C.F.R. 1245.2(a)(1)(i). Accordingly, for those aliens, an otherwise proper motion to reopen may be a necessary prerequisite to permit them to pursue that form of "substantive relief" before an IJ. *Abudu*, 485 U.S. at 104. In contrast, under the Interim Rule, an arriving alien must seek adjustment of status from USCIS, and the court of appeals correctly noted that any such appli-

cation "would never return to the immigration courts *even if denied by USCIS*." Pet. App. 19a (emphasis added). Because any application for adjustment of status that petitioner might have filed with USCIS would be entirely "independent of [petitioner's] removal proceedings," C.A. R.E., Vol. II, tab 10, at 1-2, the mere prospect that petitioner might file such an application in the future did not require the BIA to reopen his removal proceedings. See note 6, *supra* (explaining that petitioner did not file an application for adjustment of status until 2008).

Petitioner errs in contending (Pet. 11-12) that the approach followed by the BIA in this case is inconsistent with the explanatory text that accompanied the Interim Rule. The statements that petitioner identifies are contained in a section that solicits public comments about further possible changes to the regulations. In that section, the Secretary and the Attorney General state that they "are interested in receiving public comment on whether the regulations should be amended to provide additional regulatory guidance" about the circumstances under which IJs and the BIA "should exercise discretion to grant or deny a continuance for arriving aliens in removal proceedings who have filed an application for adjustment of status which remains pending with USCIS." 71 Fed. Reg. 27,589 (2006). The next sentence observes that the BIA has stated that, under existing law, "it will ordinarily be appropriate for an [IJ] to exercise his or her discretion favorably to grant a continuance or motion to reopen in the case of an alien who has submitted a prima facie approvable visa petition and adjustment application in the course of a deportation hearing." *Ibid.* After further clarifying the request for comments, the explanatory text also states that, "[i]n the meantime,

USCIS, the immigration judges, and the BIA will continue to apply the discretionary factors in accordance with the general principles noted above, and guided by prior decisions." *Id.* at 27,590.

As the court of appeals correctly explained (Pet. App. 20a), the comments quoted above, which simply describe pre-existing law, "cannot fairly be read to establish a policy requiring the reopening of proceedings even where, as here, there is no possibility that the alien's adjustment application would be adjudicated during those proceedings." Rather, those comments "merely reiterate[] the principle set forth in" previous BIA and court of appeals decisions regarding the circumstances in which IJs or the BIA should grant continuances or reopening in order to permit an alien to pursue an application for adjustment of status *before the IJ*. *Ibid.* Courts "are properly hesitant to" disregard an agency's understanding of its own regulations unless an "alternative reading is compelled by the regulation's plain language or by other indications of the [agency's] intent at the time of the regulation's promulgation." *Gardebring* v. *Jenkins*, 485 U.S. 415, 430 (1988). Petitioner does not come close to meeting those standards.

Petitioner also errs in asserting (Pet. 13) that the decisions of the BIA and the court of appeals in this case will "effectively preclude[]" an arriving alien from obtaining "an adjudication of" an application for adjustment of status. As the court of appeals observed (Pet. App. 13a n.7), petitioner has offered "no empirical support for his contention that the [framework established by the Interim Rule] bars 'virtually all' paroled aliens from pursuing the merits of their adjustment application." Nor do the facts of this case support such an assertion. At the time of his September 11, 2004, mar-

riage, petitioner had already been in the United States for nearly three-and-a-half years. Although an IJ had already ordered petitioner removed at the time of their wedding, petitioner's spouse did not file an application for an immediate relative visa until December 2004, nearly three months later. Petitioner was not ultimately removed until November 2005, and he was removed only after both the court of appeals and this Court denied his requests for a stay of removal. Petitioner does not assert that he asked USCIS to expedite consideration of his visa petition in light of his pending immigration proceedings, nor does he assert that he requested a stay of removal from DHS in order to give the agency more time to consider that application and any subsequent request for adjustment of status. See 8 C.F.R. 241.6(a) (authorizing certain DHS officials to "grant a stay of removal or deportation for such time and under such conditions as [they] may deem appropriate").

2. Petitioner contends (Pet. 14-17; Pet. Supp. Br. 1-2) that the court of appeals' decision in this case conflicts with decisions of the Second, Seventh, and Ninth Circuits. There is no ripe conflict with respect to the specific question presented here, and, even if there were such a conflict, it would be narrow and recently arising and may well be resolved without this Court's intervention.

There is no conflict between the decision below and *Sheng Gao Ni* v. *BIA*, 520 F.3d 125 (2d Cir. 2008). In *Sheng Gao Ni*, the Second Circuit concluded that the BIA had failed to "provide a rational explanation for" its decision to deny several arriving aliens' motions to reopen their removal proceedings in order to permit them to pursue applications for adjustment of status, *id.* at 130 (internal quotation marks and citation omitted), and

it "remand[ed] the[] cases to the BIA for reconsideration of whether [the aliens'] motions to reopen warrant a favorable exercise of the BIA's discretion," *id.* at 131. Petitioner's claim, however, is not that the BIA failed to provide an adequate explanation for his decision. Rather, petitioner asserts that the Board "abuse[d] its discretion as a matter of law" (Pet. i; see Pet. 1) in denying his motion to reopen. The Second Circuit did not decide that question in *Sheng Gao Ni*. Indeed, it specifically referred to the Eleventh Circuit's decision in this case and stated that it "need not decide today" whether the Eleventh Circuit's decision properly "captures the equities of the circumstances in which [the aliens in *Sheng Gao Ni*] and those similarly situated find themselves." 520 F.3d at 131.

Sheng Gao Ni is distinguishable for another reason as well. In that case, the Second Circuit "f[ou]nd no reason for the BIA to have assumed * * * that [the aliens in that case] intended to press their applications [for adjustment of status] in removal proceedings [before IJs], rather than before the USCIS, the forum designated by the" Interim Rule. 520 F.3d at 130. Here, in contrast, petitioner's motion to reopen clearly asked the BIA to "remand this case to the Immigration Court with instructions to * * * *adjudicate* his application for adjustment of status." C.A. R.E., Vol. I, tab 3, at 4 (emphasis added). Although petitioner has now attempted to recast his motion as seeking to have the IJ grant a "continuance" to permit him to pursue an application for adjustment of status with USCIS (Pet. i), that is simply not what petitioner said in his motion to reopen—or in any other document filed with the BIA before it denied petitioner's motion to reopen—and it is not what the BIA understood petitioner to be requesting when it is-

sued its July 26, 2006, decision. See C.A. R.E., Vol. II, tab 10, at 1-2 (BIA twice stating that petitioner had requested reopening "to apply for adjustment of status before the Immigration Judge").[8]

There is likewise no direct conflict between the decision below and *Ceta* v. *Mukasey*, No. 07-1863, 2008 WL 2854153 (7th Cir. 2008). The issue in *Ceta* was whether the BIA had erred in relying on the Interim Rule in affirming an IJ's denial of an alien's motion to continue his removal proceedings. See *id.* at *3-*4. The Seventh Circuit's holding was that "the BIA did not articulate a reason for denying [the alien's] motion for a continuance that was consistent with the adjustment statute," because it had "failed to address th[e] critical point" that the alien "needed more time to pursue his application" for adjustment of status with USCIS. *Id.* at *7. But, again, petitioner's claim is not that the BIA provided an *inadequate explanation* for its decision to deny his motion for reopen; petitioner's assertion is that the Board "abuse[d] its discretion as a matter of law" in doing so. Pet. i. In addition, the issue of whether to defer resolution of a still-ongoing proceeding in light of pending developments in another forum (the *Ceta* situation) is simply not the same as whether a tribunal that has already rendered a final decision should reopen its own proceedings in order to facilitate the losing party's efforts to

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[8] Even in his brief to the court of appeals, petitioner made clear that he envisioned some role for the IJ with respect to his application for adjustment of status. See Pet. C.A. Br. 22-23 ("Once [petitioner's] motion to reopen is properly granted, his application can then be heard by the IJ, or the IJ can transfer jurisdiction to the USCIS to review the application if the IJ so decides.").

obtain a form of relief that falls within the exclusive competence of another tribunal, which is the issue here.

The final decision with which petitioner asserts a conflict is *Kalilu* v. *Mukasey*, 516 F.3d 777 (9th Cir. 2008) (per curiam). *Kalilu* involved consolidated petitions for review in which an alien challenged both (i) an initial decision in which the BIA denied his applications for asylum and withholding of removal and found that he had filed an frivolous asylum application; and (ii) a subsequent decision in which the Board denied a motion to reopen. *Id.* at 778. The Ninth Circuit first determined that it was appropriate to remand the frivolous-asylum-application issue in order to permit the BIA to apply the standards set forth in its intervening decision in *In re Y–L–*, 24 I. & N. Dec. 151 (B.I.A. 2007). See 516 F.3d at 779. The court of appeals acknowledged "that, if on remand, the BIA determines that [the alien] filed a frivolous asylum application, this determination would preclude [the alien] from eligibility to adjust his status"—the only form of substantive relief that the alien had indicated an intent to pursue by way of a motion to reopen. *Id.* at 780 n.3. But the panel nonetheless then went on to conclude that the BIA had abused its discretion in relying on the Interim Rule in denying the alien's motion to reopen. *Id.* at 779-780. In reaching that conclusion, the Ninth Circuit reasoned that an arriving alien's opportunity to apply for adjustment of status with USCIS "is rendered worthless where the BIA * * * denies a motion to reopen (or continuance) that is sought in order to provide time for USCIS to adjudicate a pending application." *Id.* at 780. But see pp. 15-16, *supra* (explaining why that assertion is not correct).

There are at least four reasons why any tension between *Kalilu* and the court of appeals' decision in this

case does not warrant this Court's review at this time. First, there is the factual point that petitioner did not ask the BIA to grant his motion to reopen "in order to provide time for USCIS to adjudicate a pending application" for adjustment of status. *Kalilu*, 516 F.3d at 780; see p. 13, *supra*. Second, the statements in *Kalilu* on which petitioner relies were at least arguably dicta, because the Ninth Circuit panel itself recognized that the issue of whether the BIA had cited a valid basis for denying the alien's motion to reopen would be moot if the Board were to conclude on remand that the alien's application for asylum had been frivolous. 516 F.3d at 780 n.3. Third, on March 27, 2008, the government filed a petition for panel rehearing in *Kalilu* with respect to the portion of the panel's opinion upon which petitioner relies, and that motion remains pending.

Finally, even if the Ninth Circuit denies the government's petition for rehearing in *Kalilu*, any conflict between that decision and the Eleventh Circuit's decision in this case may well be resolved by the regulatory process of which the Interim Rule is a part. The Interim Rule was issued in order to resolve a previous conflict among the courts of appeals regarding the ability of arriving aliens to apply for adjustment of status. See 71 Fed. Reg. at 27,587. The Attorney General and the Secretary have specifically requested public comment on "whether the regulations should be amended to provide additional regulatory guidance on when the immigration judges and the [Board] should exercise discretion to grant or deny a continuance for arriving aliens in removal proceedings who have filed an application for adjustment of status which remains pending with USCIS." *Id.* at 27,589. The Attorney General and the Secretary are best situated to address in the first instance peti-

tioner's contention that the BIA's refusal to grant a motion to reopen under the circumstances presented here threatens to "preclude[] otherwise eligible arriving aliens in removal proceedings from applying for adjustment of status," Pet. 8 (emphasis deleted), as well as to determine the most appropriate solution in the event that such a problem actually exists.

3. In any event, this case would be a poor vehicle for considering the narrow question upon which petitioner seeks review.

Although the matter does not appear to have been brought to the Board's attention, it appears that the BIA would have lacked authority to grant petitioner's motion to reopen as of the date of its July 26, 2006, decision on remand. Section 1003.2(d) of Title 8 of the Code of Federal Regulations provides that "[a]ny departure from the United States, *including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings*, occurring after the filing of a motion to reopen or a motion to reconsider, shall constitute a withdrawal of such motion." (emphasis added). As noted above, petitioner was removed to Germany in November 2005, which was *before* the Board's July 26, 2006, decision that denied petitioner's motion to reopen and that is the subject of the current petition for review.[9]

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[9] Indeed, petitioner was removed to Germany before the court of appeals rendered its first decision in this case on April 13, 2006, which reversed the Board's earlier denial of petitioner's motion to reopen on March 3, 2005, and remanded to the Board for further proceedings. See *Scheerer I*, 445 F.3d at 1322. Thus, by operation of the governing regulation, petitioner's motion to reopen had already been withdrawn before the court of appeals first considered the Board's denial of that motion, and it has remained withdrawn ever since.

In addition, petitioner has failed to show that this Court's review is necessary in order to permit him to obtain any concrete benefit. Petitioner has already been removed from the United States. As a result, there would be no way for him to realize the principal benefit of obtaining lawful permanent residence by way of adjustment of status, *i.e.*, the ability to do so *without* being required to depart from the United States and pursue lawful permanent resident status from abroad. See *Randall* v. *Meese*, 854 F.2d 472, 473-474 (D.C. Cir. 1988) (R.B. Ginsburg, J.), cert. denied, 491 U.S. 904 (1989). Adjustment of status, moreover, is a form of relief that cannot be pursued from outside the United States, see 8 U.S.C. 1255(a), 8 C.F.R. 245.1(a), and petitioner's present incarceration in Germany (see note 3, *supra*) would prevent him from traveling to the United States at this point in any event.

Once petitioner is released, moreover, he will have avenues for seeking lawful permanent residence in the United States other than an application for adjustment of status. As noted earlier, see note 2, *supra*, petitioner is now the beneficiary of an approved I-130 immediate relative visa. Accordingly, upon his release from incarceration, petitioner will be eligible to seek an immigrant visa from an overseas consular officer. 8 U.S.C. 1151(b)(2)(A)(i), 1154(a)(1)(A)(i), 1201(g), 1202(a); 8 C.F.R. 204.1(e)(2) and (3). A consular officer who is presented with an approved petition for an immediate relative visa has no discretion to deny an immigrant visa to an alien who is not inadmissible under 8 U.S.C. 1182, see 8 U.S.C. 1201(g); 22 C.F.R. 42.31(a), and the denial of petitioner's motion to reopen his removal proceedings would have no prospective effect on his ability to obtain such a visa.

It is true that, as a result of having been removed from the United States, petitioner is now subject to a period of inadmissibility under 8 U.S.C. 1182(a)(9)(A)(i) and (ii). As the court of appeals emphasized, however, that period may be waived by the Secretary or his designee, USCIS, see 8 U.S.C. 1182(a)(9)(A)(iii), and DHS has indicated its "willing[ness] to entertain" such a request. Pet. App. 20a n.10. The granting of such a request would, of course, be committed to the sound discretion of certain government officials. The same thing, however, is true with respect to the two forms of relief that petitioner states that he prefers to pursue: a motion to reopen with the BIA, see *Dada* v. *Mukasey*, 128 S. Ct. 2307, 2315 (2008), and a grant of adjustment of status by USCIS, see *Abudu*, 485 U.S. at 105; 71 Fed. Reg. at 27,588.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The
Supreme Court of the United States

GERMAR SCHEERER, A/K/A GERMAR RUDOLF,

Petitioner,

v.

MICHAEL B. MUKASEY, U.S. ATTORNEY GENERAL; MICHAEL CHERTOFF, SECRETARY OF THE DEPARTMENT OF HOMELAND SECURITY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL BRIEF TO PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI

SUPPLEMENTAL BRIEF SUBMITTED PURSUANT TO SUP. CT. RULE 15.8

Pursuant to Sup. Ct. R. 15.8, "[a]ny party may file a supplemental brief at any time while a petition for writ of certiorari is pending, calling attention to new cases... not available at the time of a party's last filing."

In his Petition for Writ of Certiorari, Petitioner stated that, since the Eleventh Circuit's decision in *Scheerer II* discussed therein, both the Ninth and Second Circuit Courts of Appeals have considered the question at bar and rejected the reasoning of the Eleventh Circuit on the very grounds that the *Scheerer II* Court chose to ignore: regulatory intent, BIA precedent, and the interests of justice. *See Kalilu v. Mukasey*, 516 F.3d 777, 779 (9th Cir. 2008); *Sheng Gao Ni v. Board of Immigration Appeals*, 520 F.3d 125 (2d Cir. 2008). Both courts held that the BIA abused its discretion in denying a motion to reopen to allow for an arriving alien in removal proceedings to stay those proceedings and obtain a determination of their adjustment of status applications. As of July 25, 2008, the Seventh Circuit has now joined the majority holding of the Second and Ninth Circuits reasoning that to hold otherwise would preclude the applicant's ability to meaningfully exercise his right to file an application for adjustment of status as provided for by regulation. *See Ceta v, Mukasey*, ___ F.3d. ___, 2008 WL 2854153 (7th Cir. 2008).

In *Ceta*, the Seventh Circuit held in favor of the petitioner under the exact reasoning as is proffered in the present Petition before this Honorable Court:

> In our view, the fact that [petitioner's] application, in accordance with the amended regulation, will not be adjudicated by the immigration courts is not a sound or responsive reason for denying his continuance request. Indeed, granting a continuance in appropriate cases, as contemplated in the *Interim Rule Notice,* will ensure that the immigration courts do not intrude into the USCIS' new role, under the amended regulations, as the sole adjudicator of adjustment applications. Furthermore, any difficulty in coordinating the proceedings-- for example, after the USCIS adjudicates the adjustment application--may be resolved by counsel notifying the IJ of the ultimate outcome of the adjustment application.

Id. at *7 (citations omitted).

Petitioner files this supplemental brief to notify this Honorable Court that there is now a 3-1 split ripe for resolution. Further, it is Petitioner's case, appealed from the Eleventh Circuit, which is now in the clear minority, and it is Petitioner to whom manifest injustice is being incurred.

Therefore, this Honorable Court should grant *certiorari*, resolve this split, and restore consistency and justice across the circuits.

CONCLUSION

For the aforementioned reasons and the reasons discussed in Petitioner's Petition for Writ of Certiorari, the petition for writ of *certiorari* should be granted.

Respectfully submitted,

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REPLY BRIEF OF PETITIONER

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REPLY BRIEF SUBMITTED PURSUANT TO SUP. CT. RULE 15.6

Pursuant to Sup. Ct. R. 15.6, "[a]ny petitioner may file a reply brief addressed to new points raised in the brief in opposition . . . ."

In opposition to Petitioner's petition for writ of *certiorari*, Respondents argue, *inter alia*, that Petitioner's petition is essentially moot, as he cannot avail himself of any relief. Opp. to Pet. 21-23. Specifically, Respondents assert that ". . . petitioner has failed to show that this Court's review is necessary in order to permit him to obtain any concrete benefit. Petitioner has already been removed from the United States. As a result, there would be no way for him to realize the principal benefit of obtaining lawful permanent residence by way of adjustment of status, *i.e.*, the ability to do so *without* being required to depart from the United States and pursue lawful permanent resident status from abroad." Opp. to Pet. 22 (citing *Randall* v. *Meese*, 854 F.2d 472, 473-474 (D.C. Cir. 1988) (R.B. Ginsburg, J.), cert. denied, 491 U.S. 904 (1989)). In support of this contention, Respondents maintain that because adjustment of status is a form of relief that "cannot be pursued from outside the United States," Petitioner's deportation to, and present incarceration in, Germany precludes his ability to seek *certiorari* review. Opp. to Pet. 22 (citing 8 U.S.C. 1255(a), 8 C.F.R. 245.1(a)). Respondents further argue that *certiorari* review is inappropriate because upon Petitioner's eventual release from prison in Germany, he will then have "avenues for seeking lawful permanent residence. . . .other than

an application for adjustment of status."[1] Opp. to Pet. 22 (citing 8 U.S.C. 1151(b)(2)(A)(i), 1154(a)(1)(A)(i), 1201(g), 1202(a); 8 C.F.R. 204.1(e)(2) and (3)) (noting that Petitioner is the beneficiary of an approved I-130 immediate relative visa, making him "eligible to seek an immigrant visa from an overseas consular officer").

A case should only be "'dismissed as moot when, by virtue of an intervening event, a court of appeals cannot grant 'any effectual relief whatever' in favor of the appellant." *Calderon v. Moore*, 518 U.S. 149 (1996) (citing *Mills v. Green*, 159 U.S. 651, 653, (1895)). Contrary to Respondents' contention, Petitioner's deportation *does not* preclude this Court's grant of effectual relief to Petitioner and, therefore, does not bar *certiorari* review. Indeed, if this Court overturns the Eleventh Circuit's decision on review, Petitioner will not only be permitted automatic re-entry to the United States upon his release from German prison, but also consideration of his adjustment of status application on the merits. *See, e.g.*, *Singh v. Waters*, 87 F.3d 346, 350 (9th Cir. 1996) (Court has authority to order DHS to permit alien "to return to the United States for the purpose of appearing at a hearing before the immigration

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[1] Respondent's argument is disingenuous; as Respondent makes this argument, Respondent simultaneously acknowledges that "as a result of having been removed from the United States, petitioner is now subject to a period of inadmissibility." Opp. to Pet. 22 (citing 8 U.S.C. 1182(a)(9)(A)(i) and (ii)). Such a bar, removable only at the discretion of the Secretary or his designee USCIS, see 8 U.S.C. 1182(a)(9)(A)(iii), would preclude Petitioner from seeking lawful permanent residence for ten (10) years. *See* 8 U.S.C. 1182(a)(9)(A)(ii).

judge to determine whether discretion to adjust his status should be favorably exercised"); *Salgado-Diaz v. Ashcroft*, 395 F.3d 1158, 1167 (9th Cir. 2005) (If petitioner is eligible to show that he was unlawfully removed from the country he "will be entitled to relief available at the time of his original hearing"); *Edwards v. I.N.S.*, 393 F.3d 299, 309 (2d Cir. 2004) (*nunc pro tunc* relief is appropriate to remedy error in immigration proceedings); *Dragon v. I.N.S.*, 748 F.2d 1304, 1307 (9th Cir. 1984) (BIA abused its discretion by failing to fully consider application nunc pro tunc to reenter the United States and reopen removal proceedings where granting such relief would allow for complete disposition of the case on the merits); *Matter of Rapacon*, 14 I&N Dec. 375, 378 (BIA 1973) (application for permission to reapply for admission to the United States after deportation can be granted nunc pro tunc where appropriate). *See also*, *Rivera v. Ashcroft*, 394 F.3d 1129, 1140 (9th Cir. 2005) ("the Constitution is violated when a person with a non-frivolous claim to U.S. citizenship is deported without receiving a judicial determination of that claim"); *Iavorski v. U.S. I.N.S.*, 232 F.3d 124, 130 (2d Cir. 2000) (equitable remedy of *nunc pro tunc* relief "has long been available under immigration law"); *cf. Zalawad v. Ashcroft*, 371 F.3d 292 (5th Cir. 2004) (court has authority to "order the BIA to correct its mistakes" and order an alien returned to the United States after removal pursuant to a petition for review). Moreover, the fact that Petitioner may or may not be able to return to the United States through other means in the distant future affords Petitioner with no current, cognizable relief – relief he is presently entitled to seek from this Court.

Certiorari review in this case is not only not moot, it is in fact necessary to declare and preserve the rights of Petitioner as well as potentially hundreds and thousands of aliens similarly situated.

CONCLUSION

For the aforementioned reasons and those discussed in both the initial and supplemental petitions, Petitioner's petition for writ of *certiorari* should be granted.

Respectfully submitted,

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